Supreme Court, U.S.
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No. 01-246

IN THE

Supreme Court of the United States

MARK MORTENSON,
Petitioner

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., INC.,
A NEVADA CORPORATION;
J.A. BLACK CONSTRUCTION, INC., A NEVADA CORPORATION;
AND JAMES A. BLACK,
Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Mark Mortenson, hereby replies to the Brief in Opposition filed by Respondents, Rock Springs Vista Development Corp., *et al.*, ("Respondent") in this case with the following points of analysis.[1]

1. Regarding Respondent's Account of the Facts.

This Court has held that, where a fair housing complaint's "extreme generality" makes it "impossible to say that [plaintiffs] have made factual averments sufficient if true to demonstrate injury in fact . . . the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

The Ninth Circuit instructs district courts, when dismissing a case for failure to state a claim, to:

> grant leave to amend even if no request to amend the pleading was made, unless [the district court] determines that the pleading could not possibly be cured by the allegation of other facts.

Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en Banc decision), *quoting Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). *See also, Cook, Perkiss & Liehe v. N.C. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990) (same quotation).

Respondent, however, repeatedly overlooks the fact that this case was dismissed under Rule 12(b)(6) of the

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[1] To the extent that Respondent addresses Petitioner's claim under 42 U.S.C. § 3604(f)(1), Petitioner will not reply – except to note that the Petition for Writ of Certiorari only seeks review of matters related to the claim under 42 U.S.C. § 3604(f)(2).

Federal Rules of Civil Procedure *without leave to amend*. Thus, where Respondent argues that the "proof" of a violation (or, of an injury) is insufficient, that argument simply has no place in discussion of the early stage of proceedings at which the case presented for review was dismissed.

The proper questions before the Ninth Circuit (and, now, before this Court) concern matters of *law* and not *fact*. Arguments tending to focus this Court's attention on matters of *fact* (which arguments would be appropriate in the review of a dismissal on summary judgment) instead of the relevant matters of *law* can only serve to obfuscate the allegations of the First Amended Complaint in Intervention.[2]

2. Regarding Application of 42 U.S.C. § 3604(f)(2) to Design and Construction Violations.

The statutory scheme at issue is plain enough, but Respondent suggests that 42 U.S.C. § 3604(f)(1) would be rendered redundant if 42 U.S.C. § 3604(f)(2) is applied according to its plain terms. A similar argument would be that 42 U.S.C. § 3604(a) is rendered redundant if 42 U.S.C. § 3604(b) is applied according to its plain terms. Either

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[2] Respondent (apparently confident that this Court will choose to review dismissal under Rule 12(b)(6) motion as though it were a dismissal on a motion for summary judgment) effectively concedes the plain meaning of the allegations of the First Amended Complaint in Intervention. For example, Respondent states that "Mortenson has not alleged any connection to or interest in the condominium other than his single alleged visit . . . Mortenson has claimed to have been conducting a housing search at the time of his alleged visit, ...", (Brief in Opposition, p. 1), Respondent thus essentially *concedes* that Mortenson's First Amended Complaint in Intervention (Appendix E) alleges that Mortenson was at the site of the alleged intangible injuries. Also, Respondent effectively concedes allegation of injury: "Petitioner [has not] alleged any concrete injury *apart from* the alleged violation of 42 U.S.C. § 3604(f)(2)." (Brief in Opposition, p. 10) (emphasis added).

argument ignores the fact that, in each of these "couplets" of prohibitions on discrimination, one is aimed at discrimination that will "make unavailable or deny" a dwelling and the other is aimed at discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling."

If design and construction discrimination can only fit into one of those categories, then it certainly must be the latter: design and construction discrimination includes physical conditions (*e.g.*, a failure to place "light switches, electrical outlets, thermostats, and other environmental controls in accessible locations" 42 U.S.C. § 3604(f)(3)(C)(iii)(III)) that might not be construed as "denying" a dwelling to a disabled person, but that certainly present "conditions" that diminish the usefulness of the dwelling to a disabled person.

3. Regarding "Distinct and Palpable" Injuries.

Recognizing that Mortenson has "claimed injuries" related to "the design and construction of the Rock Springs Vista Development" (Brief in Opposition, pp. 7-8), Respondent attempts to characterize Mortenson's personal injuries (which are in the form of emotional distress) as insufficient to constitute a "distinct and palpable injury" (Brief in Opposition, p. 8) for the purpose of meeting the minimum requirements of Article III. Respondent contends that, because Mortenson "does not allege a specific housing opportunity that he wished to pursue" (Brief in Opposition, p. 8), his injury is not "distinct and palpable" but is, instead, merely "generalized."[3]

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[3] If Respondent's conclusions were applied to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and to *United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992), the "testers" in those cases would not have had standing. Of course, it is the inability to allege an interest in a particular housing opportunity that gives rise to the term of art – "tester" -- that this Court has used in the past. Respondent has quoted the *Havens* decision

The point that Respondent seems to miss in this regard is that the requisite "specificity" of the injury relates to the person alleging injury, not whether the violation at issue is found at only one "specific" dwelling. *See, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for Article III standing, however, is not injury to the environment but injury to the plaintiff.").

4. Regarding the "HUD Memorandum."

Respondent attempts to neutralize the effect of the *HUD Memorandum of February 20, 1997, issued by Sara Pratt, Director, Office of Investigations (Subject: Standing in Accessibility Cases in Light of Ricks v. Beta Development Co., 1996 U.S. App. LEXIS 19743 (9th Cir. Aug. 1, 1996)* (Appendix G, "HUD Memorandum").

Respondent asserts that the HUD Memorandum is "equivocal" (and, presumably, that the case at issue does not therefore present a departure from HUD's nationwide enforcement policies) because the HUD Memorandum uses the word "may." Some context is useful in this regard. The HUD Memorandum, as is clear from its very heading, deals with the

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out of context. This case has *never* concerned "neighborhood" standing, but Havens' discussion of the limitations of that concept is the source of Respondent's quotation (at page 8 of the Brief in Opposition) of *Havens*. This Court, however, understands that the:

> concept of 'neighborhood' standing differs from that of 'tester' standing in that the injury asserted is an indirect one: an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff. By contrast, the injury underlying 'tester' standing – the denial of the tester's own statutory right to truthful information -- is a direct one." *Havens*, 455 U.S. at 375.

effects of an unreported Ninth Circuit decision (much like the case at issue in the Petition) on the enforcement of the design and construction provisions of the Fair Housing Act. That case, *Ricks v. Beta Development Co.*, held that a disabled person must allege a genuine interest in buying a condominium if he is to have standing under 42 U.S.C. § 3604(f)(1) and the HUD Memorandum was aimed at showing HUD's enforcement offices that the effect of *Ricks v. Beta Development Co.* was limited to 42 U.S.C. § 3604(f)(1) – claims under 42 U.S.C. § 3604(f)(2) could proceed under the broader standing afforded by the "any person" language included by Congress in that provision.

Respondent, however, seizes upon the inclusion in the HUD Memorandum of the commonly-applied term "tester," which term has become judicial shorthand used to describe a person who is acting as a "private attorney general" and who is entitled to standing by virtue of the term "any person" as used in the Fair Housing Act. Although Respondent's exercise in semantics was presented to both the district court and to the Ninth Circuit, neither of the lower courts accepted the invitation to narrowly construe the term "any person" as used in 42 U.S.C. § 3604(f)(2).[4]

Plainly, there is no indication that Congress intended for Mark Mortenson's statutorily created right to accessible housing opportunities (provided by 42 U.S.C. § 3604(f)(2)) should be entitled to less vigorous enforcement than Sylvia

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[4] That the lower courts did not base their decision on narrowing the scope of the term "any person" is not surprising: in an opinion written by Judge William A. Fletcher (a member of the panel that heard the case at issue), the Ninth Circuit held that "The term 'any person' is quite broad . . . In its conventional usage, 'any' means 'ALL -- used to indicate a maximum or whole.' It certainly does not mean 'some.'" *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) (citations omitted).

Colman's "statutorily created right to truthful housing information" provided by 42 U.S.C. § 3604(d). (*See, Havens* 455 U.S. at 374) In fact, the legislative history clearly indicates precisely the opposite:

> *Aggrieved person.* Provides a definition of aggrieved person to be used under this act. In Gladstone, *Gladstone Realtors v. Village of Bellwood*, the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman*, the Court held that 'testers' have standing under title VIII, because Section 804(d) prohibits the representation 'to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.' The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

H.R.Rep. 100-711, page 23, 100th Cong., 2nd Sess. (1988).

5. Regarding Recognition of Mortenson's Intangible Injuries.

Finally, Respondent argues that the case submitted for review does not present a conflict with decisions of other United States courts of appeals. Certainly, there is no conflict concerning the particular subsection (42 U.S.C. § 3604(f)(2)) that is central to the case presented for review. The conflict at issue, however, concerns the recognition of a plaintiff's *injury* related to a violation of the Fair Housing Act. Thus, although *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) concerned a violation of 42 U.S.C. § 3604(c), the critical point for the Petition is that the mere *observation* of discrimination (together with associated emotional distress

injury) was sufficient in that case to establish standing.

If anything, the fact that the *Ragin* case concerned a violation of 42 U.S.C. § 3604(c) demonstrates an even *stronger* case of a "split in the circuits" concerning recognition of injuries under the Fair Housing Act because 42 U.S.C. § 3604(c) does not contain the important "any person" language found in 42 U.S.C. §§ 3604(b), (d), and (f)(2).[5] Thus, the Second Circuit has permitted standing (and damages) to plaintiffs (who were similarly-situated to Mark Mortenson as far as the type of and extent of injury) under a provision of the Fair Housing Act containing language that is *weaker* than 42 U.S.C. § 3604(f)(2).

Respondent apparently seeks to distinguish more than the *nature* of Mark Mortenson's intangible injuries from those that were accorded standing by various United States courts of appeals. Iin its synopsis of cases and its limited description of 42 U.S.C. § 3604(c) (as dealing only "with *racially* discriminatory advertising." Brief in Opposition, p. 9., emphasis added), Respondent calls attention to the *protected class* of the plaintiffs in the cases, and thereby gives the impression that intangible injuries related to violations of the rights of the *disabled* are somehow entitled to a different legal

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[5] This distinction has been noted by the Tenth Circuit in *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 596 (10th Cir. 1996):

> The provision here is 42 U.S.C. Section 3604(c), which prohibits discriminatory advertisements, but does not expressly state that advertisements and statements to 'any person' are unlawful; the subsection does not designate to whom the statements must be made to be unlawful. Subsection (c) therefore does not give all persons an express statutory right to be free from discriminatory advertising.

status (for the purposes of standing) as are intangible injuries related to racial discrimination or familial status discrimination. This difference is simply not found under the terms of the Fair Housing Act or any case law: the disabled are not to be held to a more stringent standard for alleging intangible injuries. *See,* H.R.Rep. 100-711, page 23, 100th Cong., 2nd Sess. (1988) (*supra*).

"Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Even if small in monetary amount, intangible injuries sustained by a civil rights plaintiff – by satisfying Article III's requisite "injury in fact" – provide a critical element in a functioning "private attorney general" enforcement provision.

CONCLUSION

The Ninth Circuit has recently considered, and sustained, the constitutionality of Ninth Circuit Rule 36-3, which Rule prohibits citation to unpublished opinions as precedent. *See Hart v. Massanari*, 2001 WL 1111647 (9th Cir., Sept. 24, 2001). Even so, "[n]onpublication must not be a convenient means to avoid review." *Smith v. United States*, 502 U.S. 1017, 1020 n. (1991) (Justice Blackmun, dissenting).

The questions presented in the Petition for Writ of Certiorari are either controlled by the *Havens* decision (regarding "tester" standing and the proper standard for dismissal under Federal Rule Of Civil Procedure 12(b)(6)) or are the subject of the HUD Memorandum (regarding the inclusion of design and construction violations within the scope of 42 U.S.C. § 3604(f)(2)). Surprisingly, *neither* of those authorities is addressed by the Ninth Circuit's decision. Accordingly, the propriety of a "GVR" order (as discussed at

pages 4-5 of the Brief of Respondent [Disabled Rights Action Committee] in Support of Petition for Writ of Certiorari) may be indicated.

Under a GVR order, the Ninth Circuit will have the opportunity to "flesh out" its opinion to explain *why* the Fair Housing Act should be interpreted in a manner contrary to HUD's understanding and to explain *why* a disabled man's intangible injury does not constitute an "injury specific to himself."

Respectfully submitted.

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